

COMMONWEALTH OF MASSACHUSETTS

**DEPARTMENT OF
INDUSTRIAL ACCIDENTS**

BOARD NO. 072111-01

Gerson DeSouza
Well Painting Inc.
Workers' Compensation Trust Fund

Employee
Employer
Insurer

REVIEWING BOARD DECISION
(Judges Carroll, McCarthy & Costigan)

APPEARANCES

R. Michael Brown, Esq., for the employee
Karen S. Fabiszewski, Esq., for the Trust Fund
Michael F. Walsh, Esq., for the employer

CARROLL, J. The uninsured employer, who was joined at hearing, appeals the administrative judge's decision ordering the Trust Fund to pay § 34 total incapacity benefits to the employee.¹ The employer argues one issue requiring recommittal for clarification.

The employer's argument is succinct. The judge allowed additional medical evidence on his own initiative to fill the "gap" between the claimed industrial injury and the § 11A medical examination. (Dec. 3; December 23, 2003 Tr. 142.)² The decision indicates that such "gap" medical evidence was indeed included in the record as Exhibit 5 ("Employee Gap Medical Reports") and Exhibit 6 ("Trust Fund Gap Medical Reports"). (Dec. 1-2.) Included in the

¹ A lump sum was executed between the employee and the Workers' Compensation Trust Fund. The case is still of import to the employer, as it is liable to the Trust Fund for reimbursement of any benefits paid to the employee, pursuant to G. L. c. 152, § 65.

² The employer does not dispute that additional medicals were allowed. In fact, the employer requested an additional thirty (30) day period in which to submit all medical records into evidence. (See letter from Attorney Michael F. Walsh to the administrative judge, dated February 2, 2004). In addition, the employer questioned a witness, Nohad Woodward, regarding a report of the Trust Fund's examiner, Dr. Caprio. (January 2, 2004, Tr. 16-23).

exhibits marked as gap medicals for the Trust Fund is the report of Anthony Caprio, M.D., the Trust Fund's examining physician under § 45. (Dec. 2.) "The employer was afforded the opportunity to have the employee examined, but did not do so." (Dec. 2.)

The employer contends the additional medical evidence was improperly admitted into evidence under the applicable regulation, 452 Code Mass. Regs. § 1.11(6), or the statute, G. L. c. 233, § 79G. The employer argues that the judge took the medical reports submitted at conference and marked them as hearing exhibits without necessary compliance with either the regulation or statute.

There is no way of knowing, on the extant record, whether the judge ran afoul of the regulation, which requires that medical reports be accompanied by a statement of the doctor's qualifications. Moreover, to the extent that the employer was unaware of the employee's intention to avail himself of the judge's allowance of additional "gap" medical evidence, it would not have been accorded an opportunity to challenge any of that evidence by deposition or motion to strike. See Behre v. General Electric Co., 17 Mass. Workers' Comp. Rep. 273, 277-278 (2003)(without authority or notice to parties, judge improperly relied on medical reports submitted solely for conference and impartial examination, and erroneously identified them as exhibits in decision); Gulino v. General Elec. Co., 15 Mass. Workers' Comp. Rep. 378 (2001), quoting O'Brien's Case, 424 Mass. 16, 23 (1996)(failure of due process results from foreclosing "opportunity to present testimony necessary to present fairly the medical issues"). Compare Dunn v. U.S. Art Co., Inc., 18 Mass. Workers' Comp. Rep. 123, 125-126 (2004) (insurer's due process rights were violated by failure of the judge to notify party of exclusion of its additional medical evidence prior to filing the decision).

We recommit the case for the judge to clarify how the disputed medical evidence came into the record, and to allow the employer to depose any medical expert whose opinion is part of such evidence.

As to the employer's other argument, that the employee was an illegal alien, and therefore not entitled to workers' compensation benefits, we find no evidence of such status in the record.³

So ordered.

Martine Carroll
Administrative Law Judge

William A. McCarthy
Administrative Law Judge

Filed: **October 7, 2005**

Patricia A. Costigan
Administrative Law Judge

³ In any event, benefits are payable regardless of the employee's status. Medellin v. Cashman KPA, 17 Mass. Workers' Comp. Rep. 592 (2003). The insurer's appeal of that decision to the Appeals Court was voluntarily dismissed on May 9, 2005.